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*EX PARTE*

Electronic Filing via ECFS

December 7, 2004

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

RE: In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Ms. Dortch:

On Friday, December 3, 2004, Steve Davis, Andrew Crain, Melissa Newman and Cronan O'Connell of Qwest Communications International Inc. ("Qwest"), and Kathryn Zachem of Wilkinson Barker Knauer, LLP, also representing Qwest, met with Jessica Rosenworcel, Legal Advisor to Commissioner Michael Copps; Scott Bergmann, Legal Advisor to Commissioner Jonathan Adelstein; and Daniel Gonzalez, Legal Advisor to Commissioner Kevin Martin in three separate meetings.

During these meetings, Qwest urged the Federal Communications Commission ("Commission") to adopt rules that would prohibit conversions from special access services to unbundled network elements ("UNEs") on a customer-specific basis. However, should the Commission fail to adopt such rules, Qwest also outlined modifications to the service eligibility criteria requirements adopted in the *Triennial Review Order*. These modifications are intended to strengthen those service eligibility criteria without detrimentally affecting competitive local exchange carriers ("CLECs") that intend to use UNEs to provide local services. This discussion was consistent with an *ex parte* Qwest filed on November 24, 2004. Further, to assist the Commission, Qwest attaches a proposed revised version of Rule 51.318 to be consistent with Qwest's proposal. In addition to the changes proposed in its November 24, 2004 *ex parte*, Qwest proposes, within this rule, an exception to the service eligibility requirements intended to address concerns about access to UNE loops for the provision of local data services.

As Qwest has addressed on the record in these proceedings, competition in Qwest's territory is apparent throughout the region in large markets, as well as in many medium to small markets.

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Therefore, Qwest stated that the Commission's impairment test(s) needs to be flexible enough to recognize competition in markets that may not be easily identified through an impairment test based solely on density, including fiber collocations or number of business access lines. To that point, Qwest proposes a market share test (*see attached*) that recognizes facilities-based competition by intermodal providers which would result in subsequent full unbundling relief to an incumbent local exchange carrier ("ILEC").

Finally, Qwest addressed the UNE-P transition and stated that the Commission should make a finding that a transition is not necessary in Qwest's region as Qwest has already implemented its Qwest Platform Plus ("QPP") Commercial agreement. To date, fifteen CLECs have signed a QPP agreement and the transition has already begun. To that end, Qwest proposes that the Commission permit an ILEC that has reached commercial agreements to discontinue the provisioning of UNE-P to existing customers in accordance with the transition terms of such commercial agreements if at least 20% of the UNE-P and the contractual substitute for UNE-P are covered under the commercial agreement (*see attached*).

In accordance with Commission rule 47 C.F.R. § 1.49(f), this *ex parte* letter is being filed electronically *via* the Commission's Electronic Comment Filing System for inclusion in the public record of the above-referenced proceedings pursuant to Commission rule 47 C.F.R. § 1.1206(b)(2).

Sincerely,

/s/ Cronan O'Connell

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§ 51.318 Eligibility criteria for access to certain unbundled network elements.

(a) Except as provided in paragraphs (b) and (c) of this section, an incumbent LEC shall provide access to unbundled network elements and combinations of unbundled network elements without regard to whether the requesting telecommunications carrier seeks access to the elements to establish a new circuit or to convert an existing circuit from a tariffed service to unbundled network elements.

(b) Eligibility requirements applicable to all DS1 and DS3 UNEs, combinations, and commingled circuits. An incumbent LEC need not provide access to (1) an unbundled DS1 or DS3 loop in combination, or commingled, with a dedicated DS1 transport or dedicated DS3 transport facility or service, or to an unbundled DS3 loop in combination, or commingled, with a dedicated DS3 transport facility or service, or (2) an unbundled dedicated DS1 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled dedicated DS3 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled DS3 loop or a DS3 channel termination service, unless the requesting telecommunications carrier certifies that the circuit will be used exclusively to provide intraLATA data services, or all of the following conditions are met:

(1) The requesting telecommunications carrier has received state certification to provide local voice service in the area being served or, in the absence of a state certification requirement, has complied with registration, tariffing, filing fee, or other regulatory requirements applicable to the provision of local voice service in that area.

(2) The following criteria are satisfied for each standalone DS1 or DS3 loop or combined circuit, including each DS1 circuit, each DS1 enhanced extended link, and each DS1-equivalent circuit on a DS3 standalone loop or enhanced extended link:

(i) Each circuit to be provided to each customer will be assigned a local number prior to the provision of service over that circuit. ;

(ii) Each DS1-equivalent circuit on a DS3 standalone loop or enhanced extended link must have its own local number assignment, so that each DS3 must have at least 28 local voice numbers assigned to it. At the time of ordering, the requesting telecommunications carrier will provide to the incumbent LEC the local number assignments associated with each DS1 by circuit.;

(iii) Each circuit to be provided to each customer will have 911 or E911 capability prior to the provision of service over that circuit. At the time of

ordering, the requesting telecommunications carrier will provide to the incumbent LEC evidence that each circuit has 911 or E911 capability.;

(iv) Each circuit to be provided to each customer will terminate in a collocation arrangement that meets the requirements of paragraph (de) of this section. At the time of ordering, the requesting telecommunications carrier will provide to the incumbent LEC information, such as the circuit facilities assignment ("CFA"), identifying the collocation arrangement to which the circuit terminates.;

(v) Each circuit to be provided to each customer will be served by an interconnection trunk that meets the requirements of paragraph (d) of this section. At the time of ordering, the requesting telecommunications carrier will provide to the incumbent LEC the network location identifiers (e.g., the "A" and "Z" locations) of the local interconnection trunks and an appropriate identifier for the interconnection trunk group.;

(vi) For each 24 DS1 standalone loops or enhanced extended links or other facilities having equivalent capacity, the requesting telecommunications carrier will have at least one active DS1 local service interconnection trunk that meets the requirements of paragraph (ed) of this section; and

(vii) Each circuit to be provided to each customer will be served by a switch capable of switching local voice traffic. At the time of ordering, the requesting telecommunications carrier will provide to the incumbent LEC the common language location identification ("CLLI") code, or other nationally-recognized switch identifier for the switch that serves each circuit.

(c) Additional eligibility requirements for all conversions from special access services to DS1 or DS3 UNEs, combinations, and commingled circuits. An incumbent LEC need not convert a special access circuit, or a portion of a special access circuit, to (1) an unbundled DS1 or DS3 loop, or (2) an unbundled dedicated DS1 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled dedicated DS3 transport facility in combination, or commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled DS3 loop or a DS3 channel termination service, unless the requesting telecommunications carrier certifies that the circuit meets the conditions in paragraph (b), and an officer of that carrier certifies the following:

(1) the requesting telecommunications carrier complies with the "local usage" requirements in the Supplemental Clarification Order, 15 FCC Rcd 9587 (2000); or

(2) the requesting telecommunications carrier complies with the following alternative requirements:

(i) the requesting telecommunications carrier is the provider of the end user's local voice services;

(ii) the requesting telecommunications carrier will not use the UNE or UNE combination exclusively to provide long distance voice service and/or interexchange data services; and

(iii) the requesting telecommunications carrier has been paying special access surcharges on the special access circuit pursuant to section 69.115(e)(6) since the circuit was installed.

(d) A collocation arrangement meets the requirements of this paragraph if it is:

(1) Established pursuant to section 251(c)(6) of the Act and located at an incumbent LEC premises within the same LATA as the customer's premises, when the incumbent LEC is not the collocator; and

(2) Located at a third party's premises within the same LATA as the customer's premises, when the incumbent LEC is the collocator.

(ed) An interconnection trunk meets the requirements of this paragraph if the requesting telecommunications carrier will transmit the calling party's number in connection with calls exchanged over the trunk.



December 3, 2004

## MEMORANDUM

Re: WC Docket No. 04-313, *In the Matter of Unbundled Access to Network Elements*  
CC Docket No. 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*

The Federal Communications Commission Must Adopt a  
“Competitive Market” Test as a Safety Net When Extensive  
Competition Develops in a Market in which Application of the  
FCC’s Theoretical “Impairment Test” Would Nevertheless Still  
Require Unbundling of Network Elements.

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Under the statutory “impairment test,” the Federal Communications Commission (“FCC”) cannot order that a network element be unbundled unless it is demonstrated that competition in a relevant market will be impaired without access to that unbundled element at Total Element Long Run Incremental Cost (“TELRIC”) prices. As a general principle, this requires the FCC to analyze whether the particular market is “suitable for competition” without access to the element. The FCC may not base its impairment decision solely on the existence of actual competition within a market. Accordingly, any impairment decision will of necessity be based on proxies for actual competition and contain at least some elements of predictive judgment. Regardless, there are markets today where the FCC’s proposed impairment analysis demonstrates that the market is not suitable for competition but have already been marked by significant and substantial competition in a manner that the impairment test did not accurately predict. In other words, any impairment test that the FCC devises will, in some markets, substantially understate the extent of actual competition. Even though the FCC may not, under the Act, limit its impairment analysis to existing competition, it must adopt a backstop to prevent the anomaly of rules that conclude that competition cannot exist in a market where it already exists.

This probability is neither speculative nor remote. Under the impairment rules that have existed in the past (those that have been vacated by the Courts in past proceedings), significant facilities-based competition has developed in areas where it would not have been predicted by the earlier impairment tests. For example, in Omaha, Nebraska, the 74<sup>th</sup> Metropolitan Statistical

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Area (“MSA”) in the United States, facilities-based competitors (primarily, but not exclusively, the local cable franchisee) currently control more than 50% of the residential and business market.<sup>1</sup> In another rural community with less than 15,000 residents, Qwest’s market share has been reduced to less than 5%.<sup>2</sup> There are other communities where Qwest’s market share has been substantially eroded, despite the fact the communities are not within what is commonly viewed as the primary location for the development of competition—larger cities and major urban areas.

While Qwest has filed a petition for forbearance from dominant carrier regulation in the Omaha MSA based on the fact that it is no longer the dominant carrier in that market, this process is cumbersome and uncertain. The continued application of the unbundling rules to markets where Qwest has lost its dominant market position cannot be countenanced or continued.<sup>3</sup> The FCC’s impairment test is statutory in nature, and, even if acceptable in theory, must take account of those instances where competition has developed in areas where the application of the FCC’s test predicted that competition would not develop. As a result, the FCC must develop a backstop or safety net that would eliminate the mandatory unbundling requirements in areas where facilities-based competition has developed despite a prediction by the impairment test that it would not do so. The continuance of mandatory unbundling in competitive markets would seriously disrupt true competition, and it is incumbent on the FCC to move quickly to avoid the development or continuation of such a situation.

This backstop mechanism should operate in a manner that is relatively self-effectuating. Incumbent local exchange carriers (“ILECs”) desiring to take advantage of the process should not be required to file a forbearance petition for communities marked by significant levels of existing facilities-based competition. An ILEC’s obligation to provide unbundled network elements in these markets would be removed automatically upon a straightforward showing that that ILEC has lost a certain percentage of its market share, or that a specified percentage of the addressable market could readily be reached by the facilities of competitive suppliers. Otherwise, the FCC will risk a proliferation of situations (such as exists in Omaha) where a hypothetical impairment finding requires unbundling despite significant market share loss by the ILEC.

In order for this test to be effective, it must be sufficiently simple to be self-executing, or practically so. As the Omaha forbearance proceeding has well illustrated, it is important for the FCC to define expeditious and meaningful processes to recognize competition when it actually

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<sup>1</sup> See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area, WC Docket No. 04-223 (filed June 21, 2004). A copy of this Petition is attached hereto.

<sup>2</sup> See Qwest Reply Comments, WC Docket No. 04-313, Declaration of David L. Teitzel and Barry Orrel, Attachment 2 (filed October 21, 2004).

<sup>3</sup> As is to be expected, the Qwest petition has been vigorously opposed by those who stand to benefit from the current regulatory system. For example, the incumbent cable provider and dominant local exchange provider, Cox Communications, Inc., has filed extensive comments opposing giving Qwest any regulatory relief at all, as have other competitors, including AT&T Corp., Sprint and MCI.

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exists, and to eliminate mandatory unbundling in such markets. The continuance of mandatory unbundling in competitive markets would seriously disrupt true competition, and it is incumbent upon the FCC to move quickly to avoid the development or continuation of such a situation. One solution to this problem has already been suggested by ACS of Anchorage, which has proposed a test by which an ILEC would be relieved of its unbundling obligations if, within an ILEC's local exchange serving area, the ILEC has lost 30% of its market share to a competitive local exchange carrier ("CLEC"), the CLEC is able to reach 60% of the customers in the market over its own loop facilities, and the CLEC is actually providing local exchange service over its own facilities.<sup>4</sup> This test provides a good beginning for analysis, although it is unrealistic in most markets outside of Alaska.

Qwest suggests that the best approach is to first look independently at actual ILEC customer loss. When the market share of non-ILEC facilities-based (*i.e.*, those supplying their own loops) carriers exceeds 30%, this fact alone is sufficient to demonstrate that competitors are not impaired without access to unbundled ILEC network elements.

In addition to the showing based on actual facilities-based competition, another strong indicator of actual competition (and thus of the absence of impairment) is the widespread existence of competitor facilities in a market. This is true even if the competitor has not yet achieved a substantial market position in terms of customer base. Qwest proposes that the ILEC be relieved of its unbundling obligation in any market where competitive facilities physically pass 40% of the customers (residential and business) within a given market.

Under either test, it would be up to the petitioning ILEC to choose and define the relevant geographic market in which to seek relief. Normally relief in these circumstances will include all unbundling requirements.<sup>5</sup> The geographic market could normally not be smaller than a wire center.

In the case of actual competition having already resulted in market share loss, all that would be required would be for the ILEC to file a petition with the FCC defining the market and demonstrating the market share percentage that the ILEC had fallen below the 70% margin specified. Objections to this petition would lie based solely on demonstration that the submitted market share data was erroneous or that the geographic market was chosen in a manner that did not reflect the actual marketplace. We suggest that the FCC adopt a rule that specifies that, in the absence of an affirmative FCC finding that the petition did not warrant grant based on these factors within 90 days of filing, the petition be deemed granted by operation of law on the 91<sup>st</sup> day after its filing.

In the case of potential competition based on facilities through which a significant percentage of the market can be served, the petitioning ILEC would be required to make a filing

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<sup>4</sup> Comments of ACS of Anchorage, Inc., WC Docket No. 04-313, at 14 (filed Oct. 4, 2004).

<sup>5</sup> Once competition within a market has reached a certain level, we submit that all ILEC facilities should be presumed to be subject to competition because the ILEC has no monopoly power which could justify further unbundling of any services or facilities.

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defining the geographic and product markets, and demonstrating that competitive facilities passed 40% of the premises within that market. Oppositions to this type of petition would be limited to demonstrating that the geographic market was chosen in a manner that did not reflect the actual marketplace, or that the statement of the percentage of competitive facilities passing premises within that market was not accurate. Because this analysis may be more sophisticated and fact-based, we recommend that the FCC adopt rules that provide for the automatic grant of such a petition unless denied within 180 days after its filing



December 3, 2004

## MEMORANDUM

Re: WC Docket No. 04-313, *In the Matter of Unbundled Access to Network Elements*  
CC Docket No. 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*

### The Transition for UNE-P

If the Federal Communications Commission ("Commission" or "FCC") eliminates mass market switching as an unbundled network element ("UNE"), as it must, it is critical that the Commission establish a prompt transition away from the UNE-Platform ("UNE-P"). However, where an incumbent local exchange carrier ("ILEC") has made available (and continues to make available) a commercial offering that is functionally equivalent to UNE-P, and that offering has proven to be attractive to competitive local exchange carriers ("CLECs") that previously purchased a significant number of UNE-P lines, the transition issue is transformed. In those circumstances, permitting non-contracting CLECs to utilize a Commission-created "transition" plan that is more favorable than that reflected in the contractual arrangements that the ILECs and CLECs have made pursuant to market forces would penalize the contracting CLECs and ILECs for having entered into contracts (at the urging of all five Commissioners). The transition has already been dealt with on a contractual basis, and this contractual transition is available to other CLECs desiring to utilize ILEC platform services. Creating a regulatory structure that would disadvantage those companies who had heeded the requests of the FCC and negotiated commercial agreements in good faith would not be consistent with the Act, and cannot be countenanced.

Thus, in these circumstances, the Commission should permit the ILEC that has reached commercial agreements to discontinue provision of UNE-P to existing customers in accordance with the transition terms of such commercial agreements and the standard non-discrimination rules that govern the offering of such contracts to other carriers. Said another way, the negotiated commercial agreement transition terms would be the transition plan for all CLECs within the ILEC region rather than a regulatory ordered transition plan. In other words, the contractual transition plan should supersede any FCC-devised transition plan applicable to other carriers. Any other result would conflict with the Commission's stated intent of incenting

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carriers to enter into commercial arrangements that are in the best interests of both CLECs and ILECs.

Qwest agrees that, for an ILEC's existing commercial agreements to supplant a transition plan established by the Commission, there must be some showing that CLECs view the ILEC's commercial offering as a meaningful substitute for UNE-P. This can best be demonstrated if a significant number of CLEC lines are covered by those agreements. Where CLECs, as a group, have voluntarily converted a substantial portion of their UNE-P lines to the ILEC's commercial offering, it is clear that the market views the commercial product as an acceptable substitute for the UNE-P. Qwest asserts that this condition is met if, as of January 1, 2005, at least 20% of CLEC platform access lines (UNE-P and the contractual substitute for UNE-P) are covered by commercial contracts not purchased as regulated UNE-P lines. This 20% standard is a very conservative figure given how recently the ILECs began offering mass market switching via commercial agreements,<sup>1</sup> and the fact that the six-month transition plan proposed by the Commission in the *NPRM* may have reduced some of the incentive for CLECs to enter into an agreement for a commercial alternative to UNE-P.

In the case of Qwest's commercial offering, QPP, numerous CLECs have entered into commercial arrangements for this offering as a substitute for UNE-P. This is not surprising given the reasonable terms of the QPP offering, which were the result of a forum between the CLECs and Qwest and intense negotiations between MCI and Qwest. As the Commission has repeatedly recognized in the context of the 1996 Act, commercial agreements are by their very nature more stable and meaningful than compliance with regulatory dictates. Moreover, the QPP arrangement itself establishes a gradual transition away from UNE-P. Currently the rate for QPP is the same as the rate for UNE-P. In January 2005, rates for QPP will increase an average of \$1.66 per month. This revised rate will remain in place for the rest of 2005. The QPP offering is also attractive to CLECs because it offers them other advantages such as discounted batch hot cut rates. Currently, 15 CLECs, including MCI, Z-Tel, and Granite Communications, have entered into QPP agreements, covering more than 295,000 lines. These agreements have been filed with the Commission under Section 211(a) of the Act and are available to other carriers on a non-discriminatory basis.

Thus, the terms of the QPP commercial arrangement resulted from trade-offs between Qwest and the CLECs. Adoption of a transition period that overrides the terms of the QPP agreement, or which is available to carriers who did not (and would not) sign the QPP agreement, would interfere with the give-and-take negotiations that led to the QPP agreement, and therefore would disincite future agreements. It also is unnecessary. The QPP agreement serves the same purposes as any transition plan established by the Commission. It avoids a sudden, dramatic price increase for CLECs serving current customers via UNE-P. It also negates any concerns about Qwest's hot cut processes, because such hot cuts are not necessary to convert from UNE-P to QPP. On the other hand, applying a more generous transition period to parties that did not sign the QPP agreement will disfavor parties that signed the commercial agreement, again disinciting parties from entering future agreements. The Commission must take

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<sup>1</sup> For example, Qwest's Qwest Platform Plus ("QPP") agreement with MCI was finalized only in July.

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appropriate steps to avoid such results. In short, in the case of ILECs that already have in place commercial agreements covering a significant number of “platform” lines as outlined above, the FCC transition plan should not apply in the exchanges in which such commercial agreements are available on a non-discriminatory basis to other carriers.

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